Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF REVERSAL

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May 17, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pp

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting Trans World Airlines, Inc., the petitioner in No. 83-997 and the respondent in No. 83-1325. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of the Council's members, or their constituents, are subject to the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (the "ADEA"). As such, they have a direct interest in the issues presented for the Court's determination in this case—i.e., whether the ADEA requires an employer to accommodate employees for an age-related reason

merely because it provides accommodation for non-age-related reasons; whether specific intent to discriminate is necessary to establish a "willful" violation of the ADEA; and whether a union found jointly with an employer to have violated the ADEA can be absolved from liability for monetary damages.

3. Because of its interest in issues arising under the ADEA, the Council has participated as amicus curiae in a number of cases in this Court involving the interpretation and enforcement of the Act. *See, e.g., Lorillard v. Pons*, 434 U.S. 573 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company v. Dartt*, 434 U.S. 99 (1977); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

5. Trans World Airlines, the Air Line Pilots Association and the United States have consented to the filing of this brief. Their consents have been filed with the Clerk. Efforts to obtain the consent of the counsel for the respondents Harold H. Thurston, Christopher J. Clark, and C. A. Parkhill were unsuccessful, thus necessitating this motion.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus

curiae in support of Trans World Airlines, Inc. ("TWA"), the petitioner in No. 83-997 and the respondent in No. 83-1325, contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of the EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1978, TWA decided to permit flight deck crew members in the status of "flight engineer" [1] to work until age seventy. Prior to this time, TWA's policy had been to require all flight crew members, including "captains" (pilots), "first officers" (co-pilots) and "flight engineers" to retire at age sixty. Federal Aviation Administration (FAA) regulations prohibit persons who have reached their sixtieth birthday from serving as pilots. 14 C.F.R. § 121.383(c). The parties do not dispute that an age below sixty is a bona fide occupational qualification ("BFOQ") under 29 U.S.C. § 623(f)(1)[2] with respect to pilots and co-pilots. No FAA regulation requires the retirement at age sixty of flight engineers.

Prior to 1978, the ADEA had been interpreted to permit the mandatory retirement of persons such as

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[1] Flight engineers are present on most commercial flights and are responsible, among other things, for pre-flight inspection and in-flight monitoring of the aircraft.

[2] 29 U.S.C. § 623(f)(1) provides in relevant part as follows:

> It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

TWA's flight engineers before age sixty-five if the retirement was pursuant to a bona fide employee benefit plan which was not being used to circumvent the policies underlying the ADEA. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). In 1978, however, the ADEA was amended to prohibit involuntary retirement before age seventy pursuant to a bona fide employee benefit plan. As a result of the 1978 amendments to the ADEA, TWA changed its policy to prohibit the mandatory retirement of "any cockpit member who [was] in a Flight Engineer status at age 60." The result of this change in policy was to permit flight engineers reaching age sixty to continue in employment and to permit captains and first officers to downbid to the position of flight engineer and to remain in that position beyond age sixty. The downbidding of captains and first officers was governed by TWA's "Working Agreement" with the Air Line Pilots Association ("ALPA"). Most of the pilots and first officers who desired to do so were able to downbid successfully to a flight engineer position before reaching age sixty and to continue in that position after reaching age sixty.

ALPA filed suit against TWA (hereinafter the "*ALPA*" action) maintaining that the policy of allowing anyone to work in the cockpit past age sixty breached the Working Agreement and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). In addition, several captains who were not able to downbid to flight engineer positions were mandatorily retired at age sixty and filed suit (hereinafter the "*Thurston*" action) challenging the policy under the ADEA.[3]

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[3] The Equal Employment Opportunity Commission ("EEOC") was allowed to intervene in the *Thurston* action as a plaintiff on behalf of other crew members who might be affected by TWA's policy.

Their complaint alleged that TWA's "age sixty" policy had not gone far enough to accommodate them and was unlawful under the ADEA.

The district court, in an opinion reported at 547 F. Supp. 1221 (S.D.N.Y. 1982), held in the *ALPA* action that TWA's elimination of its age sixty retirement policy for flight engineers was not a "major" dispute under the RLA. The court also held, over ALPA's objection, that an age under sixty for flight engineers was not a BFOQ within the meaning of 29 U.S.C. § 623(f)(1) of the ADEA, and that TWA had acted lawfully in employing persons over age sixty as flight engineers. Accordingly, the district court granted summary judgment to TWA in the *ALPA* action.

With regard to the *Thurston* action, the district court determined that none of the plaintiffs or EEOC claimants had demonstrated that a flight engineer vacancy existed at the time he applied for and was eligible for the job. Accordingly, the district court granted summary judgment for TWA in the *Thurston* action as well. In doing so, the court stated that:

> From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. 547 F. Supp. at 1229 (citation omitted).

The court of appeals, in a decision reported at 713 F.2d 940 (2d Cir. 1983), unanimously affirmed the

district court decision in the *ALPA* action, holding that the elimination of the age sixty retirement policy for flight engineers did not violate the RLA.

In a divided opinion, however, the court of appeals reversed the district court decision in the *Thurston* action. Initially the court of appeals agreed with the district court that "[a]pplying the *McDonnell Douglas* [4] formula here, it is clear, as the district court held, that appellants could not establish that there were flight engineer vacancies at the time they applied to transfer." 713 F.2d at 952. Nevertheless, the court stated that "[a] plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." Id. (Emphasis in original).

The court held that TWA's policy violated the ADEA, stating that:

> In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC must prevail on their ADEA claim. 713 F.2d at 955. (Footnote omitted).

The court also held that ALPA violated the ADEA by its role in the formulation and administration of the "age sixty" policy. 713 F.2d at 956. Despite finding ALPA liable for violations of the ADEA, the court

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[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

limited the relief against ALPA to injunctive relief, holding that the ADEA does not permit awards of back pay against a union. 713 F.2d at 957.

On the issue of liquidated damages,[5] the court stated that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Accordingly, the court ordered liquidated damages against TWA.

Judge Van Graafeiland dissented with respect to the portion of the opinion holding TWA liable in the *Thurston* action, stating that:

> Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination. 713 F.2d at 957.[6]

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[5] See the discussion below regarding liquidated damages and the standard for an award of such damages.

[6] TWA has fully briefed the issue of whether the ADEA requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons. Therefore, it is not necessary for EEAC to repeat the persuasive arguments of TWA regarding this issue, in which EEAC fully concurs. Because of page limitations and in order more fully to address the remaining issues, EEAC has limited its brief to the other two issues.

SUMMARY OF ARGUMENT

The court below erred in holding that a "willful" violation of the ADEA may be established in the absence of a specific intent to violate the Act. That Congress provided for liquidated damages under the ADEA "*only* in instances of *willful* violations" indicates that more than a mere showing that age was a factor in an employment decision is required before liquidated damages may be awarded. "Willfulness" under the liquidated damages provision requires more than the mere intent to do the act that gave rise to the violation—it requires a specific intent to violate the Act.

The decisions of the First and Seventh Circuits in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), adopting a "specific intent" standard for liquidated damages are consistent with the Congressional purpose of awarding liquidated damages only against defendants who intentionally and consciously violate the Act. The focus of these decisions on the "state of mind" of the defendant at the time of the violation is consistent with the plain language and the legislative history of the liquidated damages provision of the ADEA and should be adopted by this Court. The "specific intent" test for liquidated damages also serves to further the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress.

Decisions of the lower courts that have declined to impose a specific intent requirement for awarding liquidated damages fail to consider that a "two-tier" statutory framework was established precisely to prevent an *automatic* award of liquidated damages.

The failure of these courts to require a "specific intent" standard will result in the virtual automatic doubling of damages, in direct contravention of Congressional intent.

The decision of the court below, which declined to award monetary damages against a union found to have violated the ADEA, ignores the clear intent of Congress to end age discrimination by both employers and unions. An award of monetary damages against a union found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination. Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING A WILLFUL VIOLATION OF THE ADEA AND IN IMPOSING LIQUIDATED DAMAGES IN THE ABSENCE OF A SPECIFIC INTENT TO VIOLATE THE ACT

A. A "Specific Intent" Standard Is Most Consistent With The Statutory Scheme And The Intent Of Congress

The court of appeals below erred in holding that a "willful" violation of the ADEA may be found in the absence of a specific intent to violate the ADEA. The language of the opinion below renders double damages virtually automatic. The court stated that " '[i]n a disparate treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reasons.' " 713 F.2d at 956. (Emphasis in original).

The standard adopted by the court of appeals is contrary to the intent of Congress in limiting liquidated damages to instances of "willful" violations and to the better reasoned lower court decisions. Accordingly, the statutory distinction between "willful" and "non-willful" violations will be served best by a standard requiring a specific intent to violate the Act before liquidated damages are imposed.

The ADEA prohibits discrimination in the workplace based on age. Section 4(a), 29 U.S.C. § 623(a). The ADEA is enforced in accordance with the procedures provided under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, with certain notable exceptions. Pursuant to Section 7(b) of the Act, 29 U.S.C. § 626(b),[7] violations of the ADEA generally are to be treated as violations of the FLSA,

[7] Section 7(b) reads in relevant part as follows:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of *willful* violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. (Emphasis added).

with amounts owing as a result of a violation of the ADEA treated as "unpaid minimum wages or unpaid overtime compensation" under the FLSA. Section 7(b), 29 U.S.C. § 626(b).

In contrast to the automatic doubling of damages for violations of the FLSA, 29 U.S.C. § 216(b),[8] the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). Thus, it is clear that Congress, by restricting liquidated damages under the ADEA to "willful" violations of the Act, intended in plain statutory language to limit the awarding of liquidated damages in ADEA cases.[9] In order to determine the extent of this limitation on liquidated damages under the ADEA, it is helpful to examine the legislative history surrounding the incorporation of the "willful" standard, as well as the cases that have interpreted that standard.

The legislative history of the ADEA liquidated damages provision evidences the intent of its sponsor and Congress to impose liquidated damages only where an employer acts with the specific intent to

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[8] 29 U.S.C. § 216(b) "[b]y its terms . . . requires that liquidated damages be awarded as a matter of right for violations of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 581 n.8 (1978). Section 11 of the Portal to Portal Pay Act, 29 U.S.C. § 260, provides that liquidated damages need not be paid if the employer shows that his act or omission was in good faith. To this limited extent, Section 11 mitigates the otherwise automatic doubling of damages under 29 U.S.C. § 216.

[9] In *Lorillard v. Pons, supra,* 434 U.S. at 581, this Court noted with regard to liquidated damages that "Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful."

violate the Act. As originally proposed, the ADEA would have incorporated criminal penalties. 113 Cong. Rec. 2199 (1967). The substitution of the "willful" standard for liquidated damages was designed to serve the same purposes of deterring and punishing violators as the criminal provision would have served. *See* 113 Cong. Rec. 7076 (remarks of Sen. Javits).

In *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Fifth Circuit had occasion to consider the purposes of the ADEA liquidated damages provision. In holding that punitive damages are not available under the ADEA, the court noted that:

> It is quite apparent that Senator Javits, sponsor of the original bill and the amendments thereto which appear in the final enactment, held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. 559 F.2d at 1040. (Footnote omitted).

The "specific intent" standard for finding a "willful" violation most closely carries out the intent of Congress that the provision "deter" and "punish" "willful" violators of the Act. That Congress, which was aware of the automatic double damage provision of the FLSA, provided liquidated damages under the ADEA "*only* in instances of *willful* violations" indicates that more than a mere showing that age was a factor in an employment decision is required before liquidated damages may be awarded. Thus, in contrast to the result below, "willfulness" under the liquidated damages provision should require more than the mere intent to do the act that gave rise to

the violation—it should require a specific and conscious intent to violate the Act.

As this Court noted in *Spies v. United States*, 317 U.S. 492, 497 (1943), "willful, as we have said, is a word of many meanings, its construction often being influenced by its context." Thus, it is not surprising that the lower courts have reached conflicting conclusions regarding the meaning of the "willful" language in Section 7(b). Notwithstanding the varying results reached by the lower courts, it is submitted that a "specific intent" standard is most faithful to the purposes of the legislative scheme enacted by Congress and should be adopted by this Court.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit had occasion to consider the meaning of "willfully" under the liquidated damages provision of the ADEA. The court stated that:

> An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. 600 F.2d at 1020 n.27, quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977).

Consistent with the approach of the First Circuit in *Loeb v. Textron* is the decision of the Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981). While pointing out that a finding of liability under the ADEA could be established without any showing as to the defendant's state of mind, the court correctly observed that "by allowing liquidated damages only for a 'willful' violation, 29 U.S.C. § 626(b) (1976), Congress did not intend the doubling of damages to be automatic."

665 F.2d at 154-55. The court found support for this proposition in the legislative history of the ADEA, stating that:

> In fact, the legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible. Unlike race discrimination, age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce. 665 F.2d at 155. (Emphasis added).

With regard to the standard for determining willfulness under the Act, the Seventh Circuit held that:

> The standard for willfulness therefore should *focus on the defendant's state of mind* at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer *consciously* discriminates against an employee because of age from those in which the discrimination is unconscious. The distinction is just as necessary in disparate treatment cases as it is when the plaintiff sues on a discriminatory impact theory. We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions. We hold that, in order to prove willfullness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA. 665 F.2d at 155-56. (Emphasis added and footnotes omitted).

The approach of the Seventh Circuit in *Syvock*, focusing on the "state of mind" of the defendant, clearly maintains the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress. In this regard, the court noted that the showing that the defendant knew or reasonably should have known that its actions were inconsistent with the law:

> [M]ust clearly be greater than that necessary for the initial finding of ADEA liability. The showing must be sufficient to indicate that the defendant's discrimination was not unconscious. *In a disparate treatment case, a finding of willfullness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees.* 665 F.2d at 156 n.10 (emphasis added).

Thus, the holding in *Syvock* [10] that "direct evidence" or "compelling circumstantial evidence" of an intent to discriminate is required in order to award liquidated damages under the ADEA is consistent with the plain meaning of the statute, the intent of Congress and the First Circuit standard in *Loeb*.

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[10] The *Syvock* standard was cited with approval in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 757-59 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983). In addition, the "specific intent" standard was approved after careful discussion in *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165-66 (S.D.N.Y. 1983); *see also Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983). Both of these district court cases were decided prior to the Second Circuit's decision in the instant case.

In the instant case, the Second Circuit held that "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Citing no more than the fact that "TWA was clearly aware of the 1978 ADEA amendments," *id.* at 957, the court held TWA liable for liquidated damages. Liability for double damages based on such a minimal showing will result in virtually automatic doubling of damages in ADEA cases.

B. A Standard That Declines To Require "Specific Intent" Ignores Congressional Intent to Limit Liquidated Damages To Conscious Violations

In addition to the Second Circuit decision herein, a number of other lower courts have adopted varying standards for awarding liquidated damages which decline to impose a requirement of "specific intent" to violate the Act. Each of these decisions, however, fails to consider adequately that a "two-tier" statutory framework for back pay and liquidated damages was established by Congress precisely in order to prevent an *automatic* award of liquidated damages. Particularly in disparate treatment actions, such as the instant case, the failure of these courts to require a "specific intent" standard has resulted in the virtual automatic doubling of damages in direct contravention of Congressional intent.

A brief review of decisions adopting standards for "willful" violations in the absence of a specific intent to violate the Act clearly demonstrates the problems associated with such approaches. In *Wehr v. Bur-*

roughs Corp., 619 F.2d 276, 283 (3d Cir. 1980), the Third Circuit stated that:

> [W]e conclude that Congress did not intend to restrict the meaning of "willful" . . . to intentional violations of the ADEA. It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences.

Thus, the Third Circuit standard for willfulness does not require a "specific intent" to violate the Act and allows willfulness to be shown by a *reckless disregard of the consequences* of the defendant's action. Such a standard is inconsistent with common meanings of the term "willful" and is likely to result in the nearly automatic award of liquidated damages, since it fails to focus on the state of mind of the defendant at the time of the violation.[11]

In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113-14 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981),

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[11] The Third Circuit's standard also is inconsistent with its own definition of "willingfulness" established in the context of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, where the court stated that:

> Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply. *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd in banc*, 519 F.2d 1215 (1975), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

and *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), the Fourth Circuit has adopted the standard that "an employer acts willfully and subjects himself to [liability] if he knows or has reason to know, that his conduct is governed by [the Act]." Since nearly all employers will "know" or "have reason to know" that their conduct is "governed by the Act," the approach of the Fourth Circuit is particularly likely to result in an award of liquidated damages if used as an instruction to a jury, even where the defendant's actions were not "willful" as that term was intended by Congress and as it is commonly understood.

In *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983), the Sixth Circuit determined that it was not necessary for the plaintiff to show that a defendant acted with a specific intent to violate the Act. 696 F.2d at 1184. Rather, the court adopted the following standard for demonstrating "willfulness":

> We hold that in order to show willfulness, an ADEA plaintiff must show that the employer's actions were voluntary and intentional. The employer is not necessarily shielded from liability because he is unaware of the "implications of his actions under the Act." Alternatively, the plaintiff may receive liquidated damages if he shows that the employer was reckless in not knowing that his actions were governed by the ADEA or that the employer acted in reckless disregard of whether his actions were covered by the ADEA. 696 F.2d at 1184. (Footnote omitted).

Although the court in *Blackwell* stated that "every showing of intentional discrimination does not entitle

the plaintiff to liquidated damages," *id.*, the failure of the court to require specific intent virtually mandates an award of liquidated damages, even in cases in which Congress clearly did not intend such awards.

Finally, in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981), the Ninth Circuit noted that "the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter *intentional* violations of the ADEA." 640 F.2d at 979 (emphasis added). Despite this acknowledgment, the court declined to impose a "specific intent" requirement and found that "an ADEA plaintiff who establishes a knowing and voluntary violation of the Act is entitled to liquidated damages." *Id.* at 980. Like the other standards that fail to incorporate a showing that the ADEA violation was "conscious" or with the "specific intent" to violate the Act, the Ninth Circuit standard makes it highly likely that liquidated damages will be imposed without the requisite showing of "willfulness" that Congress intended.[12]

In disparate treatment actions, such as the instant case, the approaches outlined above have resulted in the nearly automatic imposition of liquidated dam-

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[12] One commentator has noted the problems associated with a standard, such as that adopted by the Second Circuit herein, that does not require proof of "specific intent" to violate the Act. The commentator noted correctly that under such a standard:

> [A]n employer would be guilty of a willful violation if he intended to discharge the employee, even if he did not mean to violate the Act. Under this construction, virtually every violation would be willful. Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980).

ages where a violation of the Act is found.[13] For example, in awarding liquidated damages in an ADEA case, the Second Circuit in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981), stated that:

> In finding, under proper instructions, that Heublein had denied Goodman a promotion *because of* age, the jury necessarily concluded that Heublein's action was intentional. In a discriminatory treatment case, such as this, an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason. On the other hand, in a discriminatory impact case, where an employer acts on the basis of some standard that is shown, in practice, to have a disproportionate impact on some group identifiable by a characteristic such as age, a finding of liability will not inevitably mean that the employer discriminated intentionally. (Emphasis in original).

The Second Circuit reaffirmed its adherence to automatic liquidated damages, at least in disparate treatment cases, in the instant case. 713 F.2d at 956.[14]

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[13] In *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1476 (N.D. Ala. 1983), the court found "no material difference between 'intentional' discrimination and 'willful' discrimination," 572 F. Supp. at 1581, and determined that "as a practical matter, liquidated damages are virtually automatic if there is to be any monetary recovery at all by the employee." *Id.*

[14] The importance of requiring a "specific intent" standard for liquidated damages and of not automatically awarding such damages in disparate treatment cases is enhanced by the continuing debate over the appropriateness of using a "disparate impact" theory in ADEA cases. EEAC concurs with several scholars who have argued that the disparate impact doctrine should not be applied in age discrimination cases be-

The approaches to liquidated damages in disparate treatment cases of the First and Seventh Circuits in *Loeb* and *Syvock* are more consistent with the "two-tier" statutory scheme established by Congress. As noted above, the Seventh Circuit held in *Syvock* that "[i]n a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees." 665 F.2d at 156 n.10. The court rejected an automatic award of liquidated damages in disparate treatment cases, stating that "[w]e find nothing in 29 U.S.C. § 626(b) (1976), or in the legis-

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cause the Act prohibits only *intentional* discrimination, which is properly analyzed under the disparate treatment theory. *See, e.g.*, A. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68 (1982); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982). As Justice Rehnquist noted in his dissent to the denial of certiorari in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group." 451 U.S. 945, 948 (Rehnquist, J., dissenting). If ADEA cases are limited to intentional discrimination, the automatic award of liquidated damages in disparate treatment cases would wholly undermine the "two-tier" approach to liquidated damages, contrary to the intent of Congress. In any event, it is not necessary for the Court to decide herein the issue of whether the ADEA properly is limited to allegations of disparate treatment, since this is a disparate treatment case.

lative history of the ADEA, to support such a result." *Io.* at 155.[15] It is submitted that Congress did not intend that liquidated damages would be awarded automatically in disparate treatment cases and that the requirement of a "specific intent" to violate the Act more accurately reflects Congress' wishes.

The problems inherent in any approach to liquidated damages that does not require a showing that the employer specifically intended to violate the Act are aptly demonstrated by the instant case. Following the 1978 amendments to the ADEA, TWA altered its previous policy regarding the retirement at age sixty of "flight engineers." This action was taken by TWA in a conscious effort to *comply* with the Act. In addition, with its revised policy, TWA became the only trunk airline voluntarily to permit pilots over age sixty to continue working as flight engineers. Congress could not have intended liquidated damages to be awarded in such an instance, where the employer expressly took steps beyond those taken by its competitors to insure that it would be in compliance

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[15] The court stated that simply because the jury did not accept the employer's justifications and rather found such justifications to be a pretext for discrimination did not warrant an inference that the employer acted "consciously." *Id.* at 157. In doing so, the court explained that:

> Age discrimination resulting from unconscious stereotyping of an older person's abilities violates the ADEA although it may not have occurred with the state of mind necessary to a finding of willfulness. Yet it is likely that an employer will attempt to offer a legitimate reason for its actions at trial to avoid liability in the first instance. Because the defendant's trial explanation is not believed does not mean that its original actions were in fact consciously discriminatory. *Id.*

with the law. If liquidated damages can be awarded under these circumstances, it is clear that the "standard" of "willfulness" adopted by the Second Circuit is in effect a "standard" of automatic doubling of damages in any case where a violation of the Act is found to exist.

II. A UNION FOUND TO HAVE VIOLATED THE ACT SHOULD BE HELD ACCOUNTABLE FOR MONETARY DAMAGES

The Second Circuit herein held that the ADEA "does not permit actions to recover monetary damages, including back pay, against a labor organization." 713 F.2d at 957. In doing so, the court ignored the clear intent of Congress to end age discrimination by both employers *and unions* and the strong policy reasons favoring such awards against unions. It is submitted that a monetary award against unions found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination.

It is undisputed that labor organizations are prohibited by the ADEA from discriminating on the basis of age. Section 4(c) of the ADEA, 29 U.S.C. § 623(c), expressly makes it unlawful for a labor organization "to discriminate against . . . any individual because of his age." *See also* 29 U.S.C. §§ 623 (d) and (e). In addition, the legislative history clearly is expressive of the intent of Congress to prohibit age discrimination by labor organizations. *See, e.g.*, 113 Cong. Rec. 2467 (remarks of Sen. Yarborough); 113 Cong. Rec. 34,740 (remarks of Rep. Perkins); 113 Cong. Rec. 34,743 (remarks of Rep. Kelly) (1967). Thus, there are compelling reasons

in the statutory prohibitions and legislative history of the ADEA for holding unions liable for monetary damages for proven violations of the Act.[16]

In addition to the legislative history and the provisions of the ADEA prohibiting discrimination by labor organizations, the language of the remedy provision of the ADEA supports an award of monetary damages against unions. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides in pertinent part that:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

As noted above, since the legislative history clearly reveals that an important "purpose" of the Act was

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[16] In *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that an employer had neither a federal statutory right under Title VII or the Equal Pay Act nor a federal common law right to *contribution* from a union that allegedly bore at least partial responsibility for the statutory violations. That case, however, involved a claim for contribution brought by an *employer* against a union and is not instructive of the issue presented in the instant case. In *Northwest Airlines*, this Court stated that:

> Because we conclude that no right to contribution exists under either the statute or the federal common law, we need not decide whether the elements of a contribution claim have been established in this case. Therefore, we need not and do not decide the question whether employees have an implied right of action for backpay against their unions for violations of the Equal Pay Act. 451 U.S. at 88 n.20.

to prevent union discrimination, a monetary award against union violators logically falls within the language of the Act providing for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."

Although there have been few cases addressing the issue of union liability for monetary relief under the ADEA, it is submitted that the reasoning most consistent with the legislative purpose of ending union discrimination on the basis of age is contained in *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980), *reversed on other grounds*, 661 F.2d 90 (8th Cir. 1981). In that case, the district court rejected the argument of ALPA that the employer alone is responsible for monetary awards under the ADEA. The court first "noted that ALPA has cited the court to nothing in the legislative history of the ADEA suggesting unions should be immune from damages liability, and the court also has found no such indication in the Act's legislative history or in any case law under the Act." 489 F. Supp. at 1009 n.5. Noting the language of Section 626(b), cited above, the court stated that "[i]t would not effectuate the purposes of the ADEA to allow unions to violate the act without having to be concerned with being held liable for any resulting monetary damages." *Id.* (Footnote omitted). In holding the union liable for monetary damages, the court also relied on "analogous case law under Title VII." [17] *Id.*

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[17] *See, e.g., Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 881 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977).

A monetary award against unions found to have violated the Act best serves the Congressional intent of eliminating age discrimination by unions and is most consistent with decisions under analogous statutory schemes.[18] Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.[19]

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[18] In *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), a case brought under the Equal Pay Act, the court held that a union that had jointly violated the Equal Pay Act was liable for back wages due. In so holding, the court stated that:

> If [the union's] position were correct, a union which had caused an employer to illegally withhold wages from its employees would be subject to no more than future restraint. Its past violation of the law would go uncorrected and unpunished; it could merely be prevented from breaking the law in the future. There is no apparent reason why a union which violated Section 206(d) should be treated any differently from an employer violator. Equitably, both should be subject to the same type of decree which in order to give full relief would necessarily include a provision requiring the payment of wages illegally withheld or caused to be withheld as well as one prohibiting any future violations of the law. 326 F. Supp. at 373.

This reasoning in an analogous situation under the Equal Pay Act is equally persuasive in the instant ADEA case.

[19] The importance of providing "incentives" for unions to comply with the law was recognized last term in a different context in *Bowen v. U.S. Postal Service*, 103 S.Ct. 588, 597 (1983), where this Court noted that:

> In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished.

See also Vaca v. Sipes, 386 U.S. 171 (1967).

Given the Congressional intent to prohibit such discrimination, the language of Section 626(b) itself, and the need for such a deterrent to unlawful discrimination, it is submitted that a union that has engaged in unlawful discrimination under the ADEA should be held liable for monetary damages.[20]

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Second Circuit herein should be reversed.

Respectfully submitted,

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May 17, 1984

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[20] In *Neuman v. Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982), the court held that a plaintiff was not entitled to recover monetary damages from ALPA under the ADEA. In doing so, the court relied principally on decisions under the FLSA and failed to accord appropriate weight to the legislative history of the ADEA, the language of Section 626 itself and the need for an effective deterrent to union discrimination. It is submitted that the decision in *EEOC v. Airline Pilots Ass'n* is more consistent with the intent of Congress and should be endorsed by this Court.